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No. 06-1075

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RICHARD S. ROSS, ESQ.,

Petitioner,

v.

STATE CONTRACTING & ENGINEERING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

JOHN H. PELZER
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STATEMENT OF FACTS

State Contracting must write to correct certain misstatements of the facts and procedural history in order to avoid being bound by them in the unlikely event that this Court grants certiorari. Supreme Court Rule 15.

Ross states that he signed the engagement letter with State. Petition, p.7, 8. This is inaccurate. To the contrary, the magistrate found that

> Ross claims to have signed the original Engagement Letter in June 1997. The evidence of that is conflicting, at best. No copy of that signed Engagement Letter ever surfaced throughout this litigation until after Ross prosecuted this charging lien proceeding. Only Ross claims to have had a copy of that signed letter, misplaced in his files, which copy was only found earlier this year [during the charging lien litigation].

App.163.

Ross states that there was no agreement between himself and Faro as to the division of the contingency fee, but that an equal division was "assumed." Petition, p.8. However, "Ross testified that it [sic] he had a verbal agreement with Faro that the contingency fee would be split equally (*i.e.* 50/50)." App.104. In addition, there is no record support for Ross' characterization of the payment to Faro as a *quantum meruit* measure. *See* Petition, p.11.

The Petition also inaccurately describes State's position in the charging lien litigation, suggesting that State provoked the charging lien litigation by refusing to pay Ross more than

quantum meruit. Petition, p.11, 12. From the moment the contingency occurred, State attempted to pay the fees to Ross and Faro in a manner consistent with the rulings of the magistrate, the district court, and the court of appeals, based on the money received in the settlement. App.121. This was prevented by Ross' position that he was also entitled to fees that were calculated upon the value of State's "future use and licensing revenues of the patented method." App.122. According to Ross, this was roughly double the amount that State received in the settlement, App.89, and therefore would have doubled his fee. This claim by Ross, in addition to his unwillingness to abide by his fee splitting agreement with Faro, required resolution by the magistrate, App.150-162, and the district court, App.76-83, and consumed virtually all of the labor of the court of appeals.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' INTERPRETATION OF FLORIDA LAW DOES NOT JUSTIFY GRANTING THE PETITION.

As Ross concedes, the court of appeals' decision turned entirely upon Florida state law, developed in judicial decisions regarding attorneys' fees disputes. In so doing, the court of appeals ably distinguished the Florida decisions that Ross contends should have led to a different result. App.16, 17. Without belaboring the court of appeals' correct interpretation of Florida law, and Ross' failure to address the distinctions drawn by the court of appeals between this case and the cases relied upon by Ross, this dispute simply does not warrant certiorari review.

Ross places his principal reliance for the exercise of this discretion on *Leavitt v. Jane L.*, 518 U.S. 137 (1996). That case involved nullification of a state statute, unlike this case

involving application of court decisions. The court of appeals in *Leavitt* concluded that the Utah legislature actually meant the complete opposite of what it said. Despite the legislature having declared in its statute that it would have enacted each and every restriction on abortion individually, *id.* at 139, 140, the court of appeals concluded that the Utah legislature really believed the separate sections were interrelated so that one could not stand without the other. Thus, the court of appeals directly contradicted an unambiguous provision in the state legislation. That is a far cry from interpreting, applying and distinguishing multiple decisions of multiple state courts on various aspects of contractual attorneys' fees litigation.

II. FLORIDA STATE LAW REGARDING PREVAILING PARTY STATUS FOR A CONTRACTUAL FEES CLAUSE NEED NOT BE CONSISTENT WITH THE DEFINITION OF A PREVAILING PARTY UNDER FEDERAL CIVIL RIGHTS STATUTES.

Ross' argument on this point is dependent upon his mischaracterization of the positions of the parties in the lower tribunals. Ross simply persists in ignoring the importance of the issues that he raised but which were decided against him. *See,* App.34-36.

Ross relies upon this Court's decisions interpreting 42 U.S.C. § 1988, and assumes without analysis that they must also apply in state court contract litigation. The court of appeals decision applying well-settled Florida case law is unlikely to result in any confusion in determining prevailing party status in future federal civil rights litigation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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